

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JOSE A. SANCHEZ,

Plaintiff,

v.

DONNA VIERUA, et al.,

Defendants.

Case No. 5:15-cv-01486-PSG

**REPORT AND RECOMMENDATION  
REMANDING SUA SPONTE AND  
DENYING MOTION TO PROCEED  
IN FORMA PAUPERIS**

Plaintiff Jose A. Sanchez initiated this unlawful detainer action in state court.<sup>1</sup> Defendant Donna Vierua subsequently removed the case to federal court<sup>2</sup> and at the same time filed a motion to proceed in forma pauperis.<sup>3</sup> Sanchez then declined magistrate judge jurisdiction,<sup>4</sup> so this matter will be reassigned to a district judge. The court recommends the case be remanded for lack of

<sup>1</sup> See Docket No. 1.

<sup>2</sup> See *id.*

<sup>3</sup> See Docket No. 2.

<sup>4</sup> See 28 U.S.C. § 636(c) and Fed. R. Civ. P. 72(a); see also Docket No. 4.

subject matter jurisdiction<sup>5</sup> and Vierua's motion to proceed in forma pauperis be denied as frivolous.<sup>6</sup>

When presented with an application to proceed in forma pauperis, a court must first determine if the applicant satisfies the economic eligibility requirement of 28 U.S.C. § 1915(a).<sup>7</sup> Section 1915(a) does not require an applicant to demonstrate absolute destitution.<sup>8</sup> An IFP application will be denied and the action dismissed, however, if the party seeking IFP status has filed a pleading or petition that is legally frivolous.<sup>9</sup> A submission is "frivolous" for IFP purposes and therefore subject to summary dismissal under § 1915(e)(2)(B)(i) "where it lacks an arguable basis either in law or in fact."<sup>10</sup>

In her notice of removal pursuant to 28 U.S.C. § 1446, Vierua asserts that there is federal question jurisdiction over the case based on the Protecting Tenants at Foreclosure Act 2009.<sup>11</sup> Her position lacks merit. Federal question jurisdiction depends on the contents of the plaintiff's well-pleaded complaint and may not be predicated on the defendant's counterclaims or

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<sup>5</sup> Cf. *Louden, LLC v. Pajarillo*, Case No. 12-cv-2638-EMC, 2012 WL 3155151, at \*1 (N.D. Cal. Aug. 2, 2012); *3925 Alameda Prop. LLC v. Brainerd*, Case No. 12-cv-4924-EMC, 2012 WL 5199170, at \*2 (N.D. Cal. Oct. 22, 2012); *Compass Bank v. Goble*, Case No. 12-cv-1885-WQH, 2012 WL 3229155, at \*2 (S.D. Cal. Aug. 3, 2012); *Bank of Am., Nat. Ass'n v. Soliven*, Case No. 10-cv-1844-IEG, 2010 WL 3636260, at \*2 (S.D. Cal. Sept. 14, 2010).

<sup>6</sup> Cf. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Hoke v. Arpaio*, 92 F.3d 1192, 1192 (9th Cir. 1996).

<sup>7</sup> See *Franklin v. Murphy*, 745 F.2d 1221, 1226 n.5 (9th Cir.1984).

<sup>8</sup> See *McCone v. Holiday Inn Convention Ctr.*, 797 F.2d 853, 854 (10th Cir.1982) (citing *Adkins v. E.I. Du Pont de Nemours & Co., Inc.*, 335 U.S. 331, 339 (1948)).

<sup>9</sup> See 28 U.S.C. § 1915(e)(2)(B)(i).

<sup>10</sup> *Neitzke*, 490 U.S. at 325; *Hoke*, 92 F.3d at 1192.

<sup>11</sup> See Docket No. 1 at 2; see also 12 U.S.C. § 5220.

1 defenses.<sup>12</sup> Here, while Sanchez's complaint is absent from the docket, it is evident from the  
2 notice of removal that Sanchez's complaint asserts a claim based on state law only—that is,  
3 unlawful detainer.<sup>13</sup> This is insufficient.

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5 **SO ORDERED.**

6 Dated: April 6, 2015

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9 PAUL S. GREWAL  
United States Magistrate Judge

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United States District Court  
For the Northern District of California

<sup>12</sup> See *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002); *ARCO Env'tl. Remediation, L.L.C. v. Department of Health & Env'tl. Quality of St. of Mont.*, 213 F.3d 141108, 1113 (9th Cir.2000).

<sup>13</sup> See Docket No. 1.